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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

October Term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798).

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REPLY BRIEF OF PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798).

I.
INTRODUCTION.

Respondents assert that the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. § 158(e), was enacted

by Congress "principally" to preserve a pre-existing pattern of construction industry collective-bargaining. (Board's Brief, p. 10; Unions' Brief, pp. 10-11) Petitioner, on the other hand, has suggested that the reason for the proviso's enactment was limited to the alleviation of common-situs frictions on construction jobsites where union and non-union workers work side-by-side. (Petitioner's Brief, pp. 30-34) Which view is correct appears to be pivotal to the outcome of this case.[1]

Additionally, Respondents argue (1) that the issue of a construction union's right to picket to secure a secondary boycott agreement is not properly before the Court, and (2) that, in any event, Section 8(b)(4)(A) of the Act does not restrict such picketing. (Board's Brief, pp. 36-43; Unions' Brief, pp. 36-40)

We show below (1) that Congress did not enact the proviso for the reasons advanced by Respondents, (2) that Respondents are mistaken in contending that the Section 8(b)(4)(A) issue is not properly before the Court, and (3) that Section 8(b)(4)(A) does proscribe union picketing to secure Subcontractor Clauses, even if protected by the proviso.

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[1]The Board acknowledges that if Congress enacted the Section 8(e) construction industry proviso to alleviate *Denver Building Trades* common-situs frictions between union and non-union workers, the Subcontractor Clauses at issue in this case are outside that purpose and outside the protective shelter of the proviso. (Board's Brief, p. 14)

II.
ARGUMENT.

A. This Court Previously Has Dismissed the Notion That the Construction Industry Proviso to Section 8(e) Was Enacted to Preserve the Pattern of Collective Bargaining in That Industry.

In *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975), this Court carefully examined the legislative history behind the proviso's enactment. *Id.*, at 628-630. Although this Court noted that the proviso was "explained" by a reference to a "pattern" of construction industry bargaining, *Id.*, at 628, the Court also noted that such a reference was a "bare" one. *Id.* Discounting the legislative history remarks by Senator Kennedy and Representative Thompson, *see*, 105 Cong. Rec. 17899, 18134, II Leg. Hist. of LMRDA, 1432, 1721, the Court remarked that the proviso to Section 8(e) was part of the legislative proposal to overrule *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), and stated: "[I]t [the proviso] seems, however, to have been adopted as a partial substitute for an attempt to overrule . . ." that latter decision. *Id.*, at 629.

Other references in the *Connell* opinion support the notion that the proviso was intertwined with and solely related to the proposal to overrule *Denver Building Trades*. Thus, this Court noted that the Section 8(e) construction proviso emerged from the Conference Committee as the only provision left of the parliamentary attempt to overrule *Denver Building Trades*:

> "The Conference Committee proposed to include . . . an amendment to § 8(b)(4)(B) in the Conference agreement, along with a closely linked construction-industry exemption from § 8(e). 105 Cong. Rec. 17333 (1959) (proposed Senate resolution), 2 Leg. Hist. of

> LMRDA 1383. But a parliamentary obstacle killed the § 8(b)(4)(B) amendment, and only the § 8(e) proviso survived. (references omitted)" *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, 629, n.8.[2]

Hence, what came to be known as the construction industry proviso to Section 8(e) went into the Conference Committee *only* because it was intertwined with resolution of the *Denver Building Trades* common-situs problem, and emerged in its present form *only* because the Conference Committee apparently compromised and granted some form of *Denver Building Trades* relief.

Respondents' argument that the proviso was enacted "principally" to "preserve" a pattern of bargaining is, thus, unsupported by the *Connell* opinion and is not aided by any Conference Report reference to that effect. It is logically unsupportable in light of this Court's previous articulations in *Connell* of the reason for the proviso's enactment.[3]

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[2]With respect to the 8(e) proviso the analyses accompanying the proposed Senate resolution stated:

> "4. The proviso also excerpts from the hot cargo clause and section 8(b)(4) agreements relating to contractors on the same construction project. This change in the present law, which corrects an inequity against labor, was recommended by President Eisenhower."

It is, hence, beyond question that the 8(e) proviso was intertwined with and, thus, part of the attempt to overrule the *Denver Building Trades* rationale.

[3]The *Connell* opinion also surmises that Congress, ". . . may have intended the § 8(e) proviso simply to preserve the status quo under *Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958), pending action on the *Denver Building Trades* problem in the following session. . . ." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*. Again, however, the *Connell* opinion links the proviso to *Denver Building Trades* and ". . . common-situs relationships on particular jobsites. . . ." *Id.*, at 633.

B. The Board's Assertion That the Proviso Had More Than One Purpose Is Contrary to Prior Board Holdings.

The Board's argument that the proviso had *three* purposes, *i.e.*, (1) to partially overrule *Denver Building Trades*, (2) to preserve the pattern of collective-bargaining in the construction industry, and (3) to maintain union contract standards and employee benefit continuity (Board's Brief, pp. 10-11),[4] finds no support in the legislative history accompanying the proviso enactment. As shown above, the proviso had only *one* purpose.

Moreover, the Board's Counsel's argument is contrary to the Board's *own* previous statements as to the proviso's limited purpose:

> "As was observed, upon a review of the legislative history, in *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *Int'l Union of Operating Engineers, Local 542, etc. (York County Bridge, Inc.)*, 216 NLRB 408, 409 (1975).

With adroit prestidigitation, the Board's counsel carefully fails to note that the previous explanation of the proviso's purpose is at odds with the argument it now advances in this Court. If, as the Board now says, the proviso was enacted to preserve the pattern of collective bargaining in

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[4]The Board, in reaching the decision in this matter now before the Court, did not rely upon this reasoning or argument now advanced by Board counsel (see Pet. App. C). Rather, the Board simply concluded that the *Connell* opinion merely required the existence of a bargaining relationship to privilege a Subcontractor Clause under the proviso. The Board did not attempt to demonstrate why the proviso should privilege clauses in the construction industry. Board counsel's rationalization *post hoc* shuld not be substituted for the Board's own views. Such a *post hoc* rationale appears inappropriate. *NLRB v. Yeshiva University*, 444 U.S. 672, n. 22 (1980); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

the construction industry, then presumably all forms of hot-goods, secondary subcontracting restrictions (on-site and off-site), and other picketing and boycott clauses that existed as part of that "pattern" should also have been preserved. See, Lunden, *Subcontracting Clauses in Major Contracts — Part II*, 84 Monthly Labor Review 715 (1961). But, Congress did not "preserve" all such cease-doing-business clauses. Only those provisions which were related to common-situs interests on particular construction sites where union and non-union workers were, or were to be, employed were "preserved" as Congress limited the proviso's application only to a "jobsite."

In short, the Board's ingenious argument is designed to demonstrate that construction unions should be permitted to seek, secure, agree to, enforce, and picket to obtain broad Subcontractor Clauses not limited to particular common-situs jobsite relationships in order to advance and preserve construction union boycotts, or techniques for organizing the unorganized. However, Congress limited the proviso to the single situation involving the "close relationship" between contractors at a single jobsite, *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, at 629-30, rather than grant a license to construction unions to use the proviso's shelter for other purposes.

As Petitioner demonstrated in its opening brief, the Subcontractor Clauses here are broad organizational tools, not limited to common-situs relationships on particular jobsites. (Pet. Brief, p. 36) The Clauses can not be "legalized" by Board arguments that Congress wished to protect construction union member work opportunities. However laudatory the preservation of union work opportunities or the continuity of general union benefits may be, such goals are not ones directly related to the interests served by the proviso. Broad "top-down" organizational weapons such as those

here can not be countenanced by the 8(e) proviso simply because construction unions have general internal policies or programs which might be affected. A contrary view would attribute to Congress an intent not clearly expressed anywhere in the 1959 legislative history, and contrary to this Court's previous statements. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra.*

C. Contrary to Respondents' Assertions, the Issue of a Union's Right to Picket to Obtain a Subcontractor Clause Is Properly Before This Court.

Respondents assert that whether it is lawful to strike for an agreement whose legality is otherwise preserved by the construction industry proviso is not properly presented because Petitioner did not raise it before the Board as Respondents assert is required by Section 10(e) of the Act, 29 U.S.C. § 160(e). (Board's Br., p. 36, n.30; Unions' Br., pp. 36-37) Respondents are mistaken.

The issue was raised during the consolidated oral argument before the Board prior to the Board's decision in this case. The Board recited the rule challenged here in its decision in this case and applied its rule that a union may strike to obtain an otherwise proviso-protected agreement in the decision under review. Petitioner specifically raised the issue at the first appropriate time — the Court of Appeals — after the Board had made findings and conclusions and after the Board had applied the rule to Petitioner's case. Neither the Board nor the Unions protested to the Court of Appeals that the issue was not properly raised there, either to the three-judge panel of the Court or to the *en banc* Court. Petitioner preserved the question for review in this Court by delineating it as a "Question Presented" in its Petition for Writ of Certiorari, and this Court did not limit the grant

of the Petition despite the Board's and the Unions' having opposed the grant of certiorari on this point.

The alleged bar of Section 10(e) of the Act, 29 U.S.C. § 160(e), simply has no applicability here. Petitioner, the Board's General Counsel, and the Unions presented this case to the Board for decision upon a stipulated factual record. The parties requested that the *Board*, not an Administrative Law Judge, make findings of fact and conclusions of law. Not until the Board issued its decision in this case was there any adverse finding, conclusion or remedial order to which to "object" within the meaning of Section 10(e). *Cf., Kallmann v. NLRB*, 640 F.2d 1094, 1101 n.14 (9th Cir. 1981); *AMCAR Division, ACF Industries, Inc. v. NLRB*, 596 F.2d 1344, 1350 n.8 (8th Cir. 1979).

Respondents' reliance upon cases such as *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1970); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961), and *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975), for the proposition that the issue is not properly before this Court, is in error. Those cases stand for the proposition that a finding or order must be objected to at the first available opportunity in order to be ripe for consideration by a reviewing court. The purpose of the Section 10(e) bar is to allow the Board the opportunity to consider an objection before a reviewing court does so. The cited cases are premised on "objections" or "exceptions" to Board action, and require a litigant to object after the Board, or one of its Judges, issues a ruling, finding or conclusion. Those decisions simply are not applicable to the situation here where the Board itself was the initial fact finder. Additionally, here, the Board noted its rule in its decision (Pet. App. C., pp. 90-91), and in holding the Unions' picketing did not violate the Act, applied that rule in this case. (Pet. App. C., p. 98). The Board had the opportunity to consider the issue and did so.

Indeed, when the instant case was pending before the Board, oral argument was heard in this and consolidated proceedings. The oral argument included counsel for the parties in all proceedings as well as counsel for various *amici curiae*. During oral argument, the matter of a union's right to picket to obtain Subcontractor Clauses was addressed by at least one counsel. The Board, in its decision in the instant case, noted that in making its findings and conclusions it had considered the entire record including those oral arguments made to the Board. (Pet. App. C., p. 73)

When the Board did make its findings and conclusions, Petitioner sought review thereof in the appropriate forum — the Court of Appeals. Not once, but twice was this case heard by the Court of Appeals: a three-judge panel of the Court acknowledged that Petitioner had raised the issue, but found it unnecessary to reach it (Pet. App. B., p. 69). The *en banc* Court of Appeals did reach the issue (Pet. App. A., pp. 40-41).

In sum, the question presented for review in this Court was addressed by the Board, was "objected" to at the first opportunity to do so, was considered and resolved by the Court below, and was presented to this Court in the Petition for Writ of Certiorari. Petitioner suggests that it is properly before this Court.

D. The Section 8(e) Proviso Sanctions Only Voluntary Agreements and Coercion to Exact Such Agreements Was Intended to Be Precluded by Section 8(b)(4)(A).

As Petitioner asserted in its Opening Brief (Pet. Br. pp. 43-49), construction unions were not given an exemption from the proscriptions of Section 8(b)(4) so as to secure Subcontractor Clauses. Rather, the intent of Congress was

to grant construction employers and their unions a limited right to *voluntarily* agree to the boycott inherent in a common-situs related clause. II Leg. Hist. of LMRDA, 1715 (Remarks of Representative Barden).

Respondents assert that Congress intended to preserve the law existing prior to 1959 and, thus, to preserve a union's right to picket to obtain a Subcontractor Clause.

Whatever may be said of the state of the pre-1959 law, the legislative history accompanying the 1959 amendments to the Act provides little support for Respondents. What references do exist reveal a Congressional desire to limit, not permit, construction union picketing with reference to common-situs interests, which as noted earlier, are the only ones protected by the proviso.

For example, Congress spelled out that the so-called *Sand Door* rule, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), remained applicable after the 1959 amendments so as to prevent picketing to enforce even proviso-protected agreements. H.R. No. 1147 on S. 1555, I Leg. Hist. of LMRDA, 943. And, the Congress did not pass legislative relief for construction union picketing at common-situs projects, leaving intact prior law restraining a union from engaging in picketing with a "cease doing business" objective at such projects. *Id.* Congress even limited a construction union's ability to picket for a "prehire" agreement, declaring that no coercion could be used to exact such an agreement from an unwilling employer. H.R. No. 1147 on S. 1555, I Leg. Hist. of LMRDA, 946. Construction unions were not given an exemption from Section 8(b)(4) as were garment industry unions, and Congress did not exempt construction unions from the newly-enacted Section 8(b)(7) restrictions on organizational picketing. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, at 630, 632.

Absent a *clear* indication that Congress desired to open a glaring loophole in Section 8(b)(4) the Act at the very time it was enacting legislation to close other loopholes in that same section, this Court should not read Section 8(b)(4)(A) as literally as Respondents suggest it be read. *Cf., Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra.*

III.
CONCLUSION.

The proviso's authorization extends only to those agreements which are *both* (1) contained in the context of a collective bargaining relationship, and (2) limited to common-situs relationships on particular jobsites where union and non-union workmen are employed together. This narrow protection for such agreements is not applicable to the Subcontractor Clauses before this Court because although Petitioner had a collective bargaining relationship with the Unions, these Clauses are broader than the proviso's shelter. The Clauses are "top-down" organizing provisions, not limited to particular jobsites, which force contractors such as Petitioner to assist the union in organizing its subcontractor's employees rather than protecting the union members in Petitioner's employ from having to work alongside non-union workers.

The provisions themselves, and the Unions' attempt to obtain them by picketing, should be declared unlawful by this Court.

Newport Beach, Calif.

Dated: February 23, 1982.

Respectfully submitted,

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